84-1439

Office - Supreme Court, U.S.
FILED
MAR 11 1985
ALEXANDER L. STEVAS,
CLERK

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CAROL C. JOHNSON,

Petitioner,

—against—

BRANFORD ZONING BOARD OF APPEALS,
WALTER KRESKE and ANNETTE KRESKE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

CAROL C. JOHNSON
Petitioner Pro Se
600 West 111th Street
New York, New York 10025
(212) 663-5445

2817

QUESTIONS PRESENTED

Connecticut Public Act 83-29, June 1983, (the pertinent part reading as follows:

> "(c) THE SUPREME COURT MAY TRANSFER TO ITSELF A CAUSE IN THE APPELLATE COURT, EXCEPT FOR ANY MATTER BROUGHT PURSUANT TO ITS ORIGINAL JURISDICTION UNDER SECTION 2 OF ARTICLE SIXTEEN OF THE AMENDMENTS TO THE CONSTITUTION, THE SUPREME COURT MAY TRANSFER A CAUSE OR CLASS OF CAUSES FROM ITSELF, INCLUDING ANY CAUSE OR CLASS OF CAUSES PENDING ON THE EFFECTIVE DATE OF THIS ACT, TO THE APPELLATE COURT. THE COURT TO WHICH A CAUSE IS TRANSFERRED HAS JURISDICTION.")

resulted in the Supreme Court transferring my appeal pending in the Supreme Court, starting December 14, 1982, to the Appellate Court which transfer produced the ultimate result of my appeal never being heard in the Supreme Court.

The Questions raised are:

Is the Statute prospective and is it constitutional?

Is the Statute retroactive and unconstitutional?

Is the Statute as interpreted by the Supreme Court allowing my appeal to be transferred to a lower intermediate appellate court unconstitutional

(a) because it allows, among other reasons, unbridled transfer by the Supreme Court (the determination to be made not by law but by individuals)

(b) because it allows unbridled transfer thus violating the due process and/or equal protection of the XIV Amendment to the Constitution of the United States.

Is the Statute unconstituional per se?

Is the Statute unconstitutional as interpreted by the Supreme Court?

Has the Supreme Court acted unconstitutionally under its interpretation of the Statute?

Is the downgrading unconstitutional in that it destroyed my unqualified right to have the Supreme Court entertain my appeal and to hear and decide my appeal?

PARTIES TO PROCEEDING

All parties are named in the caption. The Attorney General of the State of Connecticut has been duly and timely served with three copies of this Petition and may or may not choose to intervene or act herein.

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CASES AND AUTHORITIES

No cases are cited due to illness keeping petitioner from using the libraries.

The Appendix has a complete set of orders chronologically arranged, but in reverse order, the top being the latest.

The jurisdictional citation is set forth in the Jurisdictional Statement.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. ____

CAROL C. JOHNSON,

Petitioner,

—against—

BRANFORD ZONING BOARD OF APPEALS,
WALTER KRESKE and ANNETTE KRESKE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States

Carol C. Johnson, the petitioner herein prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Connecticut dated and entered on September 26, 1984, docket numbers PSC-84-1010, 11844.

OPINION BELOW

The final order of the Supreme Court of Connecticut, dated September 26, 1984 is unreported and is printed in Appendix at A3.

Under date of October 13, 1984 the following four motions, incorporated in one document were duly made.

"MOTIONS CONCERNING THE PETITION FOR CERTIFICATION HEREIN

This is a first motion for Resettlement of the recent order of this Court denying Plaintiff's Petition for Certification and for the insertion therein of a statement that this Court refused to consider the Constitutional Issues set forth and raised in the Petition for Certification or in lieu thereof that this Court did consider the Constitutional issues raised therein and then overruled them.

This is a second motion for reargument and oral argument.

This is a third motion for reconsideration of the Petition.

This is a fourth motion requesting that P.A. 83-29 of the June 1983 Special Session be declared unconstitutional as permitting downgrading the appeal herein resulting in loss of exercising Plaintiff's vested right to have this appeal heard by this Court."

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) and Supreme Court Rule 19.

The opinion and judgment, (actually an order) of the Supreme Court of the State of Connecticut was dated and entered on September 26, 1984.

A petition for rehearing was dismissed on October 24, 1984.

See Appendix A1 through A14: all arranged in reverse chronological order.

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

The last day for filing the petition for certiorari would have been 90 days from October 24, 1984, namely to January 23, 1985. However upon that date an extension was granted by an associate justice of the Supreme Court of the United States to February 22, 1985 on which date a further extension was granted to and including March 8, 1985.

The jurisdiction of the Supreme Court of the United States herein is as provided in 28 U.S.C. § 1257. The pertinent provision reading as follows: "§ 1257. Final judgment or decree rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

***(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of it being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of or commission held, or authority exercised, under the United States.

STATEMENT OF THIS CASE

This Petitioner had an appeal pending in the Connecticut Supreme Court on December 14, 1982. (Appendix A13).

Under date of March 29, 1983 the Supreme Court denied a motion made by the named respondents to dismiss this appeal (A12).

A new law became effective (A11).

The Supreme Court using the new law transferred the appeal down to a three-judge newly created Appellate Court (A10).

Petition had twice been sustained in the Supreme Court and had faith in it.

Petitioner contested the transfer of the appeal from the Supreme Court to the Appellate Court and therein initially raised the question of the constitutionality of the transfer at the foot of the motion for reconsideration of the transfer order and again in the Motion for Certification. The motion was denied (A9, A9.1, A9.2).

The Appellate Court sustained the Supreme Court decision from which Petitioner had appealed (A8).

Petitioner moved for reargument in the Appellate Court which was denied (A7).

Petitioner herein petitioned the Supreme Court for Certification (A6), raising the constitutional question again (A6.1).

The Certification request was denied (A5).

Petitioner then made four motions in one document (A4):

(a) to resettle;

(b) to reargue and for oral argument;

(c) for reconsideration of the motion for certification;

(d) request that the transfer law (A11) be declared unconstitutional.

Petitioner's four motions were dismissed (A3).

Petitioner has been very sick starting with an intestinal illness with eyes affected then added to by a violent attack of influenza which added to the eye trouble at times closing the eyes because of swelling to narrow slits with severe headache when eyes were used and all this was added to by the death of my 92-year-old brother.

I am 82 years old. I was prevented from going into and using the Bar Association Library.

Petitioner has lodged with the Clerk of the Court under application No. 568. nine copies of the request for adjournment which were granted in the hope that the Court will review these adjournment petitions in conjunction with this Petition.

REASONS FOR GRANTING THE WRIT

Judge Maltbie who is so highly esteemed here in New York just as he is in Connecticut said it was unfair to change the rules of the game after it was started and for that reason retroactive laws were not looked upon with favor.

By the retroactive application herein Petitioner has been deprived of a hearing of his appeal before the full bench of five Supreme Court Justices and Petitioner is confident that the proceedings in the lower Courts would be reversed as there is nothing moot about the case and my home in Connecticut has been severely harmed.

The new law takes the appellant, and the appellate procedure, out of the realm of being governed by law and replaces it with being regulated by an individual or individuals unsupervised as to the use of their discretion.

CONCLUSION

For the foregoing reasons, it is respectfully suggested that this Petition for a writ or certiorari be granted and the case be sent to the State Supreme Court for hearing of the appeal once lodged therein.

Respectfully submitted,

CAROL C. JOHNSON
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600 West 111th Street
New York, New York 10025
(212) 663-5445

APPENDICES

SUPREME COURT OF THE UNITED STATES

No. A-568

CAROL C. JOHNSON,

Applicant,

v.

BRANFORD ZONING BOARD OF APPEALS, ET AL.

ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including March 8, 1985.

/s/ Thurgood Marshall

Associate Justice of the Supreme Court of the United States

Dated this 22nd
day of February, 1985

SUPREME COURT OF THE UNITED STATES

No. A-568

CAROL C. JOHNSON,

Petitioner,

v.

BRANFORD ZONING BOARD OF APPEALS, ET AL.

ORDER EXTENDING TIME TO FILE FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including February 22, 1985.

/s/ Thurgood Marshall

Associate Justice of the Supreme Court of the United States

Dated this 23rd
day of January, 1985

SUPREME COURT

STATE OF CONNECTICUT

October 24, 1984

No. S.C. 11844

CAROL C. JOHNSON

vs.

BRANFORD ZONING BOARD OF APPEALS ET AL.

ORDER

The plaintiff's motions concerning the Petition for Certification having been presented to the court, it is hereby

Ordered Dismissed.

By The Court

FRANCIS J. DRUMM, JR.
Chief Clerk

By: /s/ CYNTHIA M. GWOREK
Assistant Clerk-Appellate

SUPREME COURT

STATE OF CONNECTICUT

October 13, 1984

No. PSC-84-1010

CAROL C. JOHNSON

vs.

BRANFORD ZONING BOARD OF APPEALS,
WALTER KRESKE ET AL.

MOTIONS CONCERNING THE PETITION FOR CERTIFICATION HEREIN

This is a first motion for Resettlement of the recent order of this Court denying Plaintiff's Petition for Certification and for the insertion therein of a statement that this Court refused to consider the Constitutional Issues set forth and raised in the Petition for Certification or in lieu thereof that this Court did consider the Constitutional issues raised therein and then overruled them.

This is a second motion for reargument and oral argument.

This is a third motion for reconsideration of the Petition.

This is a fourth motion requesting that P.A. 83-29 of the June 1983 Special Session be declared unconstitutional as permitting down grading the appeal herein resulting in lose of exercising Plaintiff's vested right to have this appeal heard by this Court.

SUPREME COURT

STATE OF CONNECTICUT

September 26, 1984

No. PSC-84-1010

CAROL C. JOHNSON

vs.

Z.B.A. of BRANFORD et al.

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the plaintiff for certification to appeal from the Appellate Court, (2 Conn. App. 24) it is hereby ordered that said petition be, and the same hereby is denied.

By The Court

FRANCIS J. DRUMM, JR.
Chief Clerk

By /s/ CYNTHIA M. GWOREK
Assistant Clerk-Appellate

Notice to:
Clerk, Superior Court, New Haven
Clerk, Appellate Court
All Counsel of Record
9-27-84

SUPREME COURT

STATE OF CONNECTICUT

J. D. OF NEW HAVEN

August 3, 1984
Docket Number

CAROL C. JOHNSON

vs.

BRANFORD ZONING BOARD OF APPEALS,
WALTER KRESKE ET AL.

PETITION FOR CERTIFICATION

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUDGES OF THE SUPREME COURT

The undersigned respectfully represents:

1. He is a party plaintiff and appellant in the above entitled action.

2. He is aggrieved by the decisions of the Courts upon law and procedure arising herein and desires to appeal therefrom and from the final judgment of the Appellate Court.

ISSUES

1. Was the appeal pending in the Superior Court which was taken from the Branford Zoning Board of Appeals' grant of a variance illegally and unconstitutionally dismissed by Judge Celotto's unlawful application of the doctrine of mootness.

2. Did the dismissal of the appeal in the Superior Court violate Plaintiff's vested and constitutional right to have the appeal decided on the merits.

3. Was the action of the Connecticut Supreme Court (after it had taken jurisdiction of the appeal from Judge Celotto's dismissal of the case oefore him) in transferring the appeal on its calendar down to the Appellate Court and then denying Plaintiff's motion to annul the said order of transfer and revest itself with the appeal, illegal and unconstitutional and in derogation of Plaintiff's vested and constitutional right to have the appeal heard by the Supreme Court.

4. Did not the Appellate Court illegally and unconstitutionally affirm Judge Celotto's dismissal of the appeal before him on the ground of mootness.

5. Was it not error on both the part of Judge Celotto and the Appellate Court to refuse to apply and comply with the 1973 Branford Zoning law that directs that the 1956 Zoning law be applied to pending cases (of which this was one) to the appeal and only after this was done to apply the 1973 zoning law TO THE RESULTANT SITUATION.

APPELLATE COURT

STATE OF CONNECTICUT

July 10, 1984

No. A.C. 2804

CAROL C. JOHNSON

vs.

ZONING BOARD OF APPEALS ET AL.

ORDER

The motion of the plaintiff filed June 11, 1984, for reargument, having been presented to the court, it is hereby

ORDERED DENIED.

By The Court

FRANCIS J. DRUMM, JR.
Chief Clerk

By /s/ CAROLYN G. CUNHA
Assistant Clerk-Appellate

CAROL C. JOHNSON *v.* ZONING BOARD OF APPEALS OF THE TOWN OF BRANFORD ET AL.
(2804)

DANNEHY, C.P.J., TESTO and HULL, Js.

Argued March 7—decision released May 22, 1984

Appeal from the decision of the defendant zoning board of appeals, brought to the Superior Court in the judicial district of New Haven, where the court, *Celotto, J.*, rendered judgment dismissing the appeal as moot, from which the plaintiff appealed. *No error.*

Carol C. Johnson, pro se, the appellant (plaintiff).

Frank J. Dumark, for the appellee (named defendant).

John W. Colleran, for the appellee (defendant Annette Kreske).

Walter J. Kreske, pro se, the appellee (defendant).

PER CURIAM. The plaintiff appeals[1] from the decision of the Superior Court dismissing as moot his appeal from the granting of a variance by the defendant zoning board of appeals. The relevant facts are as follows.

The plaintiff is the owner of a shorefront lot in Branford on which there are a dwelling house and guest house. The defendants Walter and Annette Kreske are the owners of the adjoining lot on which there are a dwelling house and an outbuilding. In 1965, the zon-

[1] This appeal, originally filed in the Appellate Session of the Superior Court, was transferred by that court to the Supreme Court, and was thereafter transferred to this court. Public Acts, Spec. Sess., June, 1983, No. 83-29, § 2 (c).

ing regulations provided that the maximum floor area of a building on either of these lots may not exceed 30 percent of the lot area. The Kreskes' house was a nonconforming use since the bulk floor area exceeded the maximum size by 7 percent. In 1965, the Kreskes applied to the Branford zoning board of appeals for a variance which would legalize additions to the house which had already been made. These additions had increased the extent of the nonconformance from 7 percent to 18 percent. The plaintiff appeared at the hearing and opposed the Kreskes' application, which was nevertheless granted by the board. The variance permitted in increase in the Kreskes' already nonconforming use from 37 percent to 48 percent of the lot area.

The plaintiff appealed to the Court of Common Pleas[2] from the board's decision. That court dismissed the appeal on the ground that the plaintiff had not been aggrieved. The plaintiff appealed to the Supreme Court which, upon determining that the plaintiff had been aggrieved, remanded the matter for consideration on the merits. *Johnson* v. *Zoning Board of Appeals*, 156 Conn. 622, 238 A.2d 413 (1968). During the pendency of the appeal on remand, the town of Branford amended its zoning ordinance in such a fashion that the Kreskes' house became a conforming use since, as amended, the regulation provided that the maximum floor area of the building could not exceed 50 percent of the lot area. No appeal was taken by the plaintiff from the amendment of the zoning regulations.

On remand to the Superior Court, the defendants each claimed by way of special defense that the amended zoning regulations had rendered the plantiff's appeal moot. The court, *Celotto, J.*, rendered judgment

[2] Merged with the Superior Court on July 1, 1978.

dismissing the appeal as moot and the plaintiff appealed.

The Supreme Court, in *Edward Balf Co.* v. *East Granby*, 152 Conn. 319, 323, 207 A.2d 58 (1965), stated that "since zoning regulations are presumed to be for the welfare of the entire community, the mere institution of a legal proceeding to determine the [party's] rights should not be allowed to 'freeze' [those] rights and possibly upset the development of a community according to its comprehensive plan." The dispute should not be settled on the basis of zoning regulations which no longer exist. Id. This lead was followed in the case of *Burgarella* v. *Planning & Zoning Commission*, 27 Conn. Sup. 400, 240 A.2d 211 (1967). In that case it was held that the appeal, based as it was on the preexisting zoning regulations, presented a moot question and should be dismissed because the relief sought would be nugatory and unavailing by reason of the subsequent change in the zoning ordinance.

Applying these principles to the case now before us, it is plain that the appeal was properly dismissed as moot since the zoning variance has been superceded by a subsequent amendment to the zoning regulations which permit the use as of right. When present regulations permit the use, the plaintiff gains nothing by his action to set aside the granting of a variance which the landowner no longer needs. In a zoning appeal the court is to take the law as it exists at the time of the review of the zoning decision complained of. See 4 Anderson, American Law of Zoning (2d Ed. 1977) § 25.31; 2 Rathkopf, The Law of Zoning & Planning (4th Ed. 1978) § 27.06. There is no practical relief which could follow were the plaintiff's appeal of the zoning variance to be sustained.

There is no error.

SUPREME COURT

STATE OF CONNECTICUT

January 3, 1984

No. 11844

CAROL C. JOHNSON

vs.

BRANFORD ZONING BOARD OF APPEALS, ET AL.

CORRECTED ORDER

The motion of the plaintiff for reconsideration of transfer order having been presented to the court, it is hereby

ORDERED that the motion is granted but the relief sought therein is denied.

By The Court

FRANCIS J. DRUMM, JR.
Chief Clerk

By /s/ M. T. ANGERS
Assistant Clerk-Appellate

RE: SUPREME COURT DOCKET #11844

CAROL C. JOHNSON

v.

BRANFORD ZONING BOARD OF APPEALS

Under date of December 15, 1983 this appeal was transferred under Section 3004A, Rules of Practice to the Appellate Court with docket number assigned to it, namely, AC2804 per Practice Book 1978, as amended, § 2010.

This is a motion to recall the appeal to the Supreme Court to be heard by the Supreme Court.

I, Carol C. Johnson, Appellant, am over 80 years of age, and the length of time that I will remain alive is questionable.

If this appeal is recalled it would not take much of the Court's time as the question is what constitutes "moot."

If the decision of this Court favored appellant the case could be restored to the Superior Court and could be completed in a day.

To have the Appellate Court decide the appeal could lead to an application to for leave to have the case restored to this Court and involve great expense and time.

Twice in the past this appellant has had to apply by way of appeal to this Court and each time this Court has held that the respective judges has abused their discretion.

Twice it was necessary for Judge Cotter to write to the Clerk of the Court of Common Pleas who once had taken approximately 2 years to act in getting the papers ready for preparation of the appeal and again after the Clerk had delayed

approximately another 2 years to actually prepare the appeal. The then Chief Justice of the Superior Court assisted appellant in obtaining the aid of Judge Cotter.

Three different times the applications of the individual appellee herein were rejected by the Zoning Commission and three times appeal was made by appellee to the Zoning Appeal Board. Twice there had been a failure on the part of appellee to properly bring the matter to the Zoning Appeal Board and when the third application was made the matter was appealed to Court of Common Pleas.

The case was finally heard by the Superior Court resulting in this appeal.

It is respectfully requested that this case be recalled so that appellant will be alive to argue the case in this Court and, if successful, in the Superior Court.

There is always the possibility of an appeal from the Appellate Court becoming necessary and a return to this Court. At appellants' age this could be disasterous. Surely the creation of an intermediate court was never meant to allow such a result which in itself would violate due process and equal protection.

It is respectfully requested that this Court arrange to hear this appeal.

CAROL C. JOHNSON
Appellant

STATE OF CONNECTICUT

Francis J. Drumm, Jr. [SEAL] Supreme Court
Chief Clerk Appellate Court

OFFICE FOR APPEALS
231 Capitol Avenue
Drawer Z, Station A
Hartford, Connecticut 06106

December 15, 1983

Re: #11844

CAROL C. JOHNSON

v.

BRANFORD ZONING BOARD OF APPEALS

Dear Counsel:

Pursuant to section 3004A of the rules of practice, the Supreme Court has transferred the captioned appeal to the Appellate Court.

The Appellate Court docket number assigned is A.C. 2804 Practice Book, 1978, as amended, § 2010.

Use only the Appellate Court number on all future filings.

Very truly yours,

/s/ FRANCIS J. DRUMM, JR.
Francis J. Drumm, Jr.

Notice sent: Dec. 15, 1983
All counsel of record.
Trial Court. N.H. (80783L)

P.A. 83-29, June 1983

(b) THE FOLLOWING MATTERIALS SHALL BE TAKEN DIRECTLY TO THE SUPREME COURT: (1) ANY MATTER BROUGHT PURSUANT TO THE ORIGINAL JURISDICTION OF THE SUPREME COURT UNDER SECTION 2 OF ARTICLE SIXTEEN OF THE AMENDMENTS TO THE CONSTITUTION; (2) AN APPEAL IN ANY MATTER WHERE THE SUPERIOR COURT DECLARES INVALID A STATE STATUTE OR A PROVISION OF THE STATE CONSTITUTION; (3) AN APPEAL IN ANY CRIMINAL ACTION INVOLVING A CONVICTION FOR A CAPITAL FELONY, CLASS A FELONY, OR OTHER FELONY, INCLUDING ANY PERSISTENT OFFENDER STATUS, FOR WHICH THE MAXIMUM SENTENCE WHICH MAY BE IMPOSED EXCEEDS TWENTY YEARS; (4) REVIEW OF A SENTENCE OF DEATH PURSUANT TO SECTION 53a-46b; (5) ANY ELECTION OR PRIMARY DISPUTE BROUGHT TO THE SUPREME COURT PURSUANT TO SECTION 9-323 OR SECTION 9-325; (6) AN APPEAL OF ANY REPRIMAND OR CENSURE OF A PROBATE JUDGE, PURSUANT TO SECTION 45-11g; (7) ANY MATTER REGARDING JUDICIAL REMOVAL OR SUSPENSION PURSUANT TO SECTION 51-51j; (8) AN APPEAL OF ANY DECISION OF THE JUDICIAL REVIEW COUNCIL PURSUANT TO SECTION 51-51r; (9) ANY MATTER BROUGHT TO THE SUPREME COURT PURSUANT TO SECTION 52-265a; (10) WRITS OF ERROR, PURSUANT TO SECTION 52-272; AND (11) ANY OTHER MATTER AS PROVIDED BY LAW.

SUPREME COURT

STATE OF CONNECTICUT

March 29, 1983

No. 11844

CAROL C. JOHNSON

vs.

BRANFORD ZONING BOARD OF APPEALS, ET AL.

ORDER

The motion of the defendant to dismiss the appeal of the plaintiff having been heard by the court, it is hereby

ORDERED by the Supreme Court, that said motion be and the same is hereby DENIED.

By The Court,

/s/ DONALD H. DOWLING

Chief Clerk

APPELLATE SESSION OF SUPERIOR COURT

HARTFORD COUNTY

December 14, 1982

No. A.S. 1372

CAROL C. JOHNSON

vs.

ZONING BOARD OF APPEALS OF THE TOWN OF BRANFORD, ET AL

ORDER

Because your appeal to the Appellate Session of the Superior Court in the above-captioned matter is properly within the jurisdiction of the Supreme Court (see General Statutes §51-197d), it is hereby transferred to that court. Practice Book, 1978, § 1068.

This appeal was taken from a decision of the Branford Zoning Board of Appeals to the court of common pleas[1] on November 23, 1968. The legislature did not limit the right of appeal in zoning cases to the supreme court to review by certification until September 1, 1971. Public Acts, 1971, No. 870 § 9. The plaintiff therefore had an unqualified right of appeal from a final judgment of the court of common pleas at the time he brought the administrative appeal to that court in 1968. General Statutes §52-263 (1958 Rev.). Whereupon, the appeal is hereby transferred.

By the Court

/s/ DALY, J.

Presiding Judge

Counsel pro se notified of order 12/14/82

1 Merged with the Superior Court on July 1, 1978.

SUPERIOR COURT

JUD. DIST. OF NEW HAVEN

May 24, 1982

CAROL JOHNSON

vs.

BRANFORD ZONING BOARD OF APPEALS

FINDINGS AND JUDGMENT

Before: HON. DONALD CELOTTO

THE COURT: I will make a finding that the Plaintiff, Carol C. Johnson, is an aggrieved party and therefore has standing to bring this action, if that finding has not already been previously made.

I find that the Board of Zoning Appeals back in '68 granted a variance to increase a non-conforming use by increasing the floor area ratio from .37 to .48 of property of the defendant, Mr. Kresge.

I will find that thereafter in 1973 by virtue of the promulgation of new zoning regulations the zoning for the R-3 Zone in which the Kresge property was situated was increased so that maximum floor area permitted as of right was .50. It has been demonstrated that that regulation was passed in '73, and I therefore find that questions involved in this particular appeal are moot, and therefore the appeal is dismissed.

* * *

/s/ DONALD W. CELOTTO, J.

ROBERT GECI
Court Reporter

Judgment Entered May 24, 1982

Counsel (parties) notified May 26, 1982

Office - Supreme Court, U.S.
FILED
APR 10 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1439

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CAROL C. JOHNSON,

Petitioner,

v.

BRANFORD ZONING BOARD OF APPEALS,
WALTER KRESKE and ANNETTE KRESKE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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BEST AVAILABLE COPY

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IN THE

Supreme Court of the United States

CAROL C. JOHNSON,

Petitioner,

v.

BRANFORD, ZONING BOARD OF APPEALS,
WALTER KRESKE and ANNETTE KRESKE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

STATEMENT OF THE CASE

This petition for certiorari represents this pro se plaintiff's latest maneuver in almost 20 years of continuous litigation arising out of a zoning dispute between residential neighbors.

The facts, as set forth in the Appellate Court's decision (App. pp. A8-A8.2), may be summarized briefly. The Branford, Connecticut, Zoning Board of Appeals granted a variance of 11% of the bulk area ratio to cover an already built addition to the Kreskes' house. The petitioner, pro se, appealed that decision. While the action was pending, the Branford Planning and Zoning Commission, in 1973, undertook an extensive revision of the entire zoning ordinance and increased the floor area ratio in the zone in question to 50% of the lot area. As a result, the size

of :e Kreskes' house was permitted as a matter of right, and therefore no variance was necessary.

The Trial Court therefore dismissed this appeal as being moot. (App. p. A14) Petitioner appealed that decision, and it was placed on the calendar of the Connecticut Supreme Court.

In 1982, while this case was pending in the Connecticut Supreme Court, Section 1 of Article Fifth of the Connecticut Constitution was amended to establish an Appellate Court, beneath the Supreme Court. Thereafter, the Connecticut Legislature passed the necessary legislation to establish the Appellate Court. P.A. Spec. Secs. June 1983, No. 83-29, Sec. 3, codified as C.G.S. Sec. 51-197a. As part of that legislation, the Supreme Court was authorized to shift a portion of its work load to the newly formed Appellate Court, so that this new court would not be sitting for months without cases ready to provide business, while the Supreme Court's load remained unabated. P.A., Spec. Sess. June 1983, No. 83-29, Sec. 2 (c), codified as C.G.S. Sec. 51-199(c) (Resp. App. p. 3a). A procedure was established to provide for certification to the Supreme Court of important issues after a hearing and decision by the Appellate Court, a procedure not unlike the certiorari provisions of this court. P.A. Spec. Sess. June 1983, No. 83-29, Sec. 7, codified as C.G.S. Sec. 51-597f (Resp. App. p. 2a).

On December 15, 1983, the Connecticut Supreme Court transferred this case to the Appellate Court. (App. p. A10). The petitioner filed a motion at that time requesting the Supreme Court to recall the case from the Appellate Court (App. pp. A9.1-A9.2), but the motion was denied. (App. p. A9). No petition for writ of certiorari was filed in the United States Supreme Court by petitioner at that time.

This case was then briefed and orally argued before the Appellate Court on the merits, which sustained the decision of the trial court. (App. pp. A8-A8.2).

Petitioner thereafter applied to the Connecticut Supreme Court for certification from the Appellate Court (App. pp. A6-A6.1), briefs were filed by all parties, and the Connecticut Supreme Court, on September 27, 1984, denied the Petition for

Certification. (App. p. A5). Thereafter, the petitioner filed other motions in the Connecticut Supreme Court, reprinted in his brief, (App. p. A4) which were dismissed. (App. p. A3).

Petitioner has now filed this petition for a writ of certiorari in this court finally seeking review of the issue resolved against him in December, 1983.

SUMMARY OF ARGUMENT

A. The Connecticut legislature did not violate Petitioner's Due Process rights, when it established an intermediate appellate court and authorized the Connecticut Supreme Court to transfer pending cases thereto.

B. The petitioner did not give the Connecticut courts a sufficient opportunity to consider this issue affecting their jurisdiction.

C. The petitioner did not file this petition in a timely fashion.

ARGUMENT

A. *This Case Raises No Substantial Federal Question. Accordingly, Certiorari Is Not Appropriate.*

Although not limiting the discretion of this Court, the considerations governing the granting of a writ of certiorari are set forth in Supreme Court Rule 17. None of those provisions provides any basis for granting this petitioner's request. Petitioner raises no conflict between any federal or state courts on the issues presented. See Rule 17.1(a) and (b). Nor is there is any unsettled issue of Federal law or action by the Connecticut Supreme Court which violates any prior decision of this Court. See Rule 17.1(c).

Plaintiff's sole claim is that the change in the jurisdiction of the Connecticut Supreme Court, which resulted in the transfer of his case, violated his due process rights. For well over a hundred years, the decisions of this Court have uniformly upheld the rights of legislatures to remove jurisdiction from a court, even

this Court itself. Thus, in *Ex Parte McCardle*, 7 Wall (74 U.S.) 506 (1868) and *Railroad Co. v. Grant*, 8 Otto (98 U.S.) 398 (1878), this Court dismissed appeals already pending before it, where Congress, during the pendency of those appeals, removed the Supreme Court's jurisdiction over the issues raised.[1] Accord, *Railroad Company v. Trook*, 10 Otto (100 U.S.) 112 (1879); *Dennison v. Alexander*, 80 Otto (103 U.S.) 522 (1880).

More recently, this Court has upheld the dismissal of a case in the District Court, where, after that case was filed, the jurisdictional legislation was amended to transfer from the District Court to the Court of Claims Tucker Act actions brought by certain federal employees, including plaintiff in that case, *Bruner v. United States*, 343 U.S. 112 (1952).

In summary, the sole question raised in this petition is one which has been resolved against petitioner in numerous cases decided over the space of a century, by decisions which have consistently rejected petitioner's claim. There is no need, in an age when courts must consider new methods for dealing with overcrowded dockets, see e.g. Burger, C.J., "Annual Report on the State of the Judiciary", as reported at 69 A.B.A. Journal 442, 446-47 (April, 1983), to discourage experimentation, by granting yet one more reconsideration of the hoary issue raised here.

B. *The Record Below Does Not Justify Granting of Certiorari.*

The granting of certiorari is an extraordinary remedy which is used only sparingly by this Court. See *Fay v. Noia*, 372 U.S. 391, 436 (1963). One of the factors to be considered in exercising this discretion is whether the issue which this Court is asked to consider is brought to it with a full record and adequate consideration by the court below. *Bacchus Imports, Ltd. v. Dias*, U.S. , 104 S.Ct. 3049, 3059 (1984); *Ellis v. Dixon*, 349 U.S. 458 (1955). This is particularly true where the federal issues raised are closely intertwined with state rules of

[1] In *Ex Parte McCardle*, this Court had even been subjected to four days of oral argument before its jurisdiction was dislodged. 7 Wall (74 U.S.) at 508.

procedure, *Duncan v. Tennessee*, 405 U.S. 127 (1972), for " 'due regard for the appropriate relationship of this Court to state courts . . .' demands that these courts be given an opportunity to consider the constitutionality of the actions of state officials . . . ," *Illinois v. Gates*, U.S. , , 103 S.Ct. 2317, 2323 (1983).

In this case, the constitutional issue of which the petitioner seeks consideration was raised only in passing by him below. Only in a motion for reconsideration (App. p. A9.2) and his petition for certification to the State Supreme Court (App. p. A6.1), both of which were decided without full briefs or oral argument, did petitioner address this major attack on the state's readjustment of its appellate jurisdiction. Even there he gave it only passing attention, limiting his arguments to a single paragraph in a scattershot application, raising numerous issues. In the Appellate Court, where full briefs were filed, oral argument heard, and a full hearing available, petitioner never raised the claim.

C. *The Petition Was Not Filed in a Timely Fashion.*

The petitioner has waited until the allegedly unconstitutional system had been in effect for a year-and-a-half before raising his objection to this Court. Had he been serious about either the merits of his constitutional claim or his contention that delay in consideration of his claim by the Connecticut Supreme was prejudicial, petitioner should have filed for certiorari with this Court after the granting, on December 15, 1983 (App. p. A16), of the transfer which he seeks to challenge. See *Monks v. New Jersey*, 398 U.S. 71 (1970) (12 year delay in bringing petition). The 90-day provisions of 28 U.S.C. Sec. 2101(c) are designed to assure speedy consideration of issues by this Court. That section requires review within ninety days after the entry of the challenged decree. Here petitioner seeks review of the transfer dated December 15, 1983. Accordingly, this petition, to be timely was due on March 15, 1984.

On this sparse record and untimely filing, it would be improvident for this Court to consider an issue which could impact not

only the entire Connecticut judicial scheme, but any other federal or state procedure implementing a new tier of appellate courts.

CONCLUSION

This petition for a writ of certiorari raises only one issue—an issue which minimal research (see Petr's. Br. p. v) would have demonstrated to this pro se petitioner has been foreclosed for over a hundred years. It is time for twenty-one years of litigation over petitioner's neighbors' carport to an end.

The petition for a writ of certiorari to the Connecticut Supreme Court should be denied.

RESPECTFULLY SUBMITTED

BRANFORD BOARD OF ZONING APPEALS,

By:

David A. Reif
Its Attorney

ANNETTE KRESKE,

By:

John W. Colleran
Her Attorney

WALTER KRESKE,

PRO SE,

RESPONDENT'S APPENDIX

P.A. Spec. Sess. June 1983, No. 83-29,
Sec. 3, codified as C.G.S. Sec. 51-197a

(a) Appeals from final judgments or actions of the superior court shall be taken to the appellate court in accordance with section 51-197c, except for small claims, which are not appealable, appeals within the jurisdiction of the supreme court as provided for in section 51-199, appeals as provided for in section 8-8, section 8-9, section 8-28 and section 8-30, and except as otherwise provided by statute.

(b) The appellate court may issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law.

(c) All matters pending in the appellate session of the superior court on July 1, 1983 shall be construed as pending with the same status in the appellate court on said date.

(d) Nowithstanding subsection (c) of this section, the appellate session of the superior court shall continue to have jurisdiction over appeals which it heard prior to July 1, 1983, pursuant to the provisions which were applicable at such time.

(e) Except as otherwise provided in public act 83-29, June Special Session, all jurisdiction conferred upon and exercised by the appellate session prior to July 1, 1983 of the superior court shall be transferred to the appellate court.

P.A. Spec. Sess. June 1983, No. 83-29.
Sec. 7, codified as C.G.S. Sec. 51-197f

Upon final determination of any appeal by the appellate court, there shall be no right to further review except the supreme court shall have the power to certify cases for its review upon petition by an aggrieved party or by the appellate panel which heard the matter and upon the vote of two justices of the supreme court so to certify and under such other rules as the justices of the supreme court shall establish. The procedure on appeal from the appellate court to the supreme court shall, except as otherwise provided, be in accordance with the procedure provided by rule or law for the appeal of judgments rendered by the superior court, unless modified by rule of the justices of the supreme court.

C.G.S. Sec. 51-199, including P.A. Spec. Sess. June 1983, No. 83-29, Sec. 2(c) codified as 51-199(c)

(a) The supreme court shall have final and conclusive jurisdiction of all matters brought before it according to law, and may carry into execution all its judgments and decrees and institute rules of practice and procedure as to matters before it.

(b) The following matters shall be taken directly to the supreme court: (1) any matter brought pursuant to the original jurisdiction of the supreme court under section 2 of article sixteen of the amendments to the constitution; (2) an appeal in any matter where the superior court declares invalid a state statute or a provision of the state constitution; (3) an appeal in any criminal action involving a conviction for a capital felony, class A felony, or other felony, including any persistent offender status, for which the maximum sentence which may be imposed exceeds twenty years; (4) review of a sentence of death pursuant to section 53a-46b; (5) any election or primary dispute brought to the supreme court pursuant to section 9-323 or section 9-325; (6) an appeal of any reprimand or censure of a probate judge, pursuant to section 45-11g; (7) any matter regarding judicial removal or suspension pursuant to section 51-51j; (8) an appeal of any decision of the judicial review council pursuant to section 51-51r; (9) any matter brought to the supreme court pursuant to section 52-265a; (10) writs of error, pursuant to section 52-272; and (11) any other matter as provided by law.

(c) The supreme court may transfer to itself a cause in the appellate court. Except for any matter brought pursuant to its original jurisdiction under section 2 of article sixteen of the amendments to the constitution, the supreme court may transfer a cause or class of causes from itself, including any cause or class of causes pending on July 1, 1983, to the appellate court. The court to which a cause is transferred has jurisdiction.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

United States Supreme Court Rule 17.1

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Connecticut Constitution
Article Fifth, Section 1

The judicial power of the state shall be vested in a supreme court, an appellate court, a superior court, and such lower courts as the general assembly shall, from time to time, ordain and establish. The powers and jurisdiction of these courts shall be defined by law.